

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

THE ERECTION COMPANY, et al.,

Plaintiffs,

v.

ARCHER WESTERN CONTRACTORS,
LLC, et al.,

Defendants.

ARCHER WESTERN
CONTRACTORS, LLC,

Counterclaimant

v.

THE ERECTION COMPANY,

Counterdefendant.

ARCHER WESTERN
CONTRACTORS, LLC,

Cross-Claimant,

v.

POSTEL INDUSTRIES, INC.,

Cross-Defendant.

ARCHER WESTERN
CONTRACTORS, LLC,

Third-Party Plaintiff,

v.

TRAVELERS CASUALTY & SURETY
COMPANY OF AMERICA, et al.,

Third-Party Defendants.

Case No. 2:12-cv-00612-MMD-NJK

ORDER

1 **I. SUMMARY**

2 This Order addresses the following pending motions: (1) The Erection Company's
 3 ("TEC") Motion for Summary Judgment Against Postel Industries ("Postel")¹ on Its
 4 Counter-Claim (Re: Postel's Abandonment) (dkt. no. 151); (2) TEC's Motion for
 5 Summary Judgment Against Archer Western Contractors ("Archer") on All Claims (Re:
 6 Invalid Assignment) (dkt. no. 152); (3) TEC's Motion for Partial Summary Judgment
 7 Against Archer on Its Affirmative Claims (Re: Standing In Postel's Shoes) (dkt. no. 153);
 8 (4) Postel's Motion for Summary Judgment Against TEC (dkt. no. 154); (5) Defendant
 9 Travelers Casualty and Surety Company of America's ("Travelers") Motion for Partial
 10 Summary Judgment (dkt. no. 158); (6) Archer's Motion for Partial Summary Judgment on
 11 The Third Cause of Action of Its Crossclaim Against Postel (dkt. no. 159); (7) Archer's
 12 Motion for Summary Judgment on the Third and Fourth Causes of Action of Postel's
 13 Crossclaims Against Archer (dkt. no. 160); (8) Archer's Motion for Summary Judgment
 14 on Plaintiff's First and Second Claims for Relief (dkt. no. 161); (9) Archer's Motion for
 15 Partial Summary Judgment on Plaintiff's Third Claim for Relief (dkt. no. 162); (10)
 16 Archer's Motion for Partial Summary Judgment on the First Cause of Action of its
 17 Counterclaim Against Plaintiff (dkt. no. 163); (11) Archer's Motion to Strike or Disregard
 18 the Affidavit of Danny Lucas (dkt. no. 201); and (12) TEC's Motion for Clarification and/or
 19 Relief from Order (dkt. no. 218).² Travelers joined in all four of TEC's motions. (Dkt. nos.
 20 155, 156, 157, 219.)

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23 ¹TEC names three Postel entities: Postel Erection Group, LLC; Postel West, Inc.;
 24 and Postel Industries, Inc. (Dkt. no. 48.) The first two entities were dismissed pursuant to
 25 the parties' stipulation. (Dkt. no. 150.)

26 ²TEC filed three separate motions for partial summary judgment while Archer filed
 27 five separate motions. Why these separate motions were not filed as one consolidated
 28 motion by each party is beyond contemplation. The separate motions result in
 duplicative filings, repetitive recitations of claimed undisputed facts and standards of
 review, and a burden on the Court in having to review multiple duplicative filings and
 tracking multiple responses, replies, joinders and response to joinders.

1 **II. BACKGROUND**

2 This dispute arises from the construction of a new air traffic control tower at
 3 McCarran International Airport (“the Project”). Clark County leased the property to the
 4 Federal Aviation Administration (“FAA”) in order to build the control tower. (Dkt. no. 86-
 5 2.) On September 3, 2010, the FAA hired Archer to be the general contractor on the
 6 Project. (Dkt. no. 85 at 3; dkt. no. 96 at 8.) In May 2011, Archer hired Postel as the
 7 subcontractor for steel fabrication and installation, and Postel, in turn, hired TEC as the
 8 subcontractor for steel installation.³ (Dkt. no. 85 at 3-4; dkt. no. 96 at 10; dkt. no. 27 at
 9 10.) The contract between Archer and Postel (“Postel Subcontract”) expressly
 10 incorporated the prime contract between Archer and the FAA (dkt. no. 96-4 at 2); the
 11 contract between Postel and TEC (“TEC Subcontract”) expressly incorporated the Postel
 12 Subcontract (dkt. no 88-5 at 2).⁴ Archer obtained a payment bond and a performance
 13 bond from Travelers. (Dkt. no. 85 at 9; dkt. no. 96 at 8.)

14 According to TEC, it expected to start work after Archer installed the rebar and
 15 concrete to form the tower walls up to approximately the fifth level. (Dkt. no. 86 at 4.) At
 16 that point, TEC would begin installing structural steel anchored to the concrete walls to
 17 support the stairs, landings, and deck that it would also install. (*Id.*) TEC would then
 18 generally follow behind Archer’s work by about two floors. (*Id.*) TEC commenced work on
 19 November 14, 2011, and completed work through level 12. (*Id.*) However, a dispute
 20 arose about alleged performance and payment that led Postel to assign the TEC
 21 Subcontract to Archer, and that prompted TEC to issue notices of intent to stop work.

22 With respect to performance, on November 19, 2011, Archer put Postel on notice
 23 that the FAA’s inspectors had discovered deficiencies in the stairs that Postel had

25 ³The parties offer different dates for the two pertinent subcontracts. Both
 26 subcontracts identify May 20, 2011 as the agreement date, but the Postel Subcontract
 27 was signed several months later. (Dkt. no. 96-4; dkt. no. 88-6.) TEC asserts that the TEC
 28 Subcontract was signed on November 8, 2011. (Dkt. no. 86 ¶ 10.)

⁴TEC disputes that the TEC Subcontract incorporated the Postel Subcontract.
 (Dkt. no. 182 at 6.)

1 delivered to the Project and that the issue was affecting the Project schedule. (Dkt no.
 2 96-5.) On January 3, 2012, Archer requested that Postel submit a recovery schedule for
 3 stair no. 3 because Postel and TEC were behind schedule and were more than two
 4 floors below Archer's concrete operation. (Dkt. no. 96-7.) On January 13, 2012, Archer
 5 sent Postel another letter to relate that Postel had not provided a recovery schedule and
 6 to provide notice that Archer would be withholding all future payments to Postel until
 7 issues identified in the letter had been addressed. (Dkt. no. 96-8.) On February 20,
 8 2012, Archer served Postel with a "Notice to Cure," stating that Postel had failed to
 9 comply with the parties' contract terms and that Postel had informed Archer that it "no
 10 longer wishes to perform contractual obligations." (Dkt. no. 86-9.)

11 In the meantime, on February 16, 2012, TEC issued to Postel a "Notice of Intent
 12 to Stop Work" because, according to TEC, it had yet to be paid for any of its work. (Dkt.
 13 no. 85 at 14; dkt. no. 86-8.) In that Notice, TEC stated that Postel owed at least
 14 \$80,000.00 for two months of base-contract work and for extra work billed; TEC
 15 demanded payment within ten (10) days. (Dkt. no. 88-8.) On February 22, 2012, TEC
 16 notified Postel that it had learned from Archer that Postel had abandoned the Project,
 17 which TEC construed to be a material breach of the TEC Subcontract. (Dkt. no. 86-10.)
 18 TEC stated that it "is immediately stopping all work on the Project." (*Id.*) On February 24,
 19 2012, TEC notified Archer that it would be stopping work on February 28, 2012.⁵ (Dkt.
 20 no. 86-15.) TEC stopped work as noticed.⁶ (Dkt. no. 86-16.)

21 On February 24, 2012, Archer sent TEC a letter along with payment on behalf of
 22 Postel in the amount of \$54,645.30 for what Archer characterized as "properly supported
 23

24 ⁵In the same letter, TEC referenced Archer's rejection of its proposed "Time &
 25 Materials Agreement," the purpose of which was to allow TEC to continue working on the
 Project. (Dkt. no. 86-15.)

26 ⁶The records offer conflicting dates as to when TEC stopped work on the Project.
 27 TEC's February 22, 2012, letter stated it was stopping work immediately (dkt. no. 86-10),
 28 but TEC's February 24, 2012, letter to Archer stated that it would stop work on February
 28, 2012, and would demobilize on February 29, 2012 (dkt. no. 86-15). Thus, at the
 latest, TEC stopped work on February 29, 2012.

1 and documented pay applications through the end of December, 2011.”⁷ (Dkt. no. 96-9.)
 2 In the same letter, Archer acknowledged that there may be invoices for extra work but
 3 contended that TEC had not submitted proper supporting documents; Archer invited
 4 TEC to provide the documentation. (*Id.*) Archer claims that TEC did not submit the
 5 requested documentation. (Dkt. no. 96-1 ¶ 29.) TEC claims no further documentation
 6 was needed because it had provided all supporting documents to Postel. (Dkt. no. 182 at
 7 6; dkt. no. 86 at 5-6.) In a letter dated February 27, 2012, Archer informed TEC that
 8 Postel had not abandoned the Project and was involved and committed to work with
 9 Archer to fulfill Postel’s contractual obligations to Archer. (Dkt. no. 96-10.) Archer
 10 contended that the Postel Subcontract, which was incorporated into the TEC
 11 Subcontract, provides for the assignment of the TEC Subcontract to Archer. (*Id.*) Archer
 12 also insisted that TEC had no legitimate reason to stop work. (*Id.*) On February 28, 2012,
 13 TEC gave Postel further Notice of Intent to Terminate in fifteen (15) days (on March 14,
 14 2012).⁸ (Dkt. no. 86-18.) On March 2, 2012, TEC notified Postel that it had ceased work
 15 and demobilized from the Project as a result of Postel’s failure to pay and abandonment
 16 of the Project. (Dkt. no 86-19.)

17 On March 1, 2012, Archer and Postel entered into an Assignment Agreement
 18 (“the Assignment”) where Postel agreed to assign all of “its rights and obligations under
 19 the TEC Subcontract” to Archer. (Dkt. no. 96-1 ¶ 32; dkt. no. 96-11.) The next day,
 20 Archer notified TEC that it had taken an assignment of the TEC Subcontract. (Dkt. no.
 21 86-20.) Archer again disputed TEC’s contention that Postel had abandoned the Project
 22 and that TEC had not been paid for all properly supported payment applications through
 23 December. (*Id.*) Archer further took the position, which TEC disputes, that TEC was in
 24 default and issued a notice to cure. (*Id.*) TEC acknowledged notice of the assignment of

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 26 ⁷TEC received the letter on February 27, 2012. (Dkt. no. 85 at 10.) TEC contends
 27 that, by that time, the payment from Archer still left a balance of over \$250,000.00. (Dkt.
 28 no. 86 at 11; dkt. no. 86-19.)

⁸TEC asserts that it acted pursuant to advice of counsel to comply with Nevada’s Prompt Payment Act. (Dkt. no. 85 at 17.)

1 the TEC Subcontract and indicated its willingness to re-mobilize and return to the Project
2 provided that Archer pay three enumerated past due amounts totaling about \$52,147.00.
3 (Dkt. no. 96-13.) Archer rejected TEC's payment demand and insisted that TEC
4 remobilize and agree to "the terms of the new project recovery schedule via change
5 order and accept a back charge in the amount of \$72,356 for the direct delay" caused by
6 TEC. (Dkt. no. 96-14.) On March 15, 2012, Archer declared TEC to be in default. (Dkt.
7 no. 96-15.)

8 TEC's First Amended Complaint asserts claims for breach of contract, breach of
9 the implied covenant of good faith and fair dealing, and unjust enrichment against Postel
10 and Archer. (Dkt. no. 48.) Archer asserts claims for breach of contract and negligence
11 against TEC, and claims for contractual indemnity and breach of contract against Postel.
12 (Dkt. no. 9.) Postel similarly asserts claims for breach of contract and negligence against
13 TEC, and claims for contractual indemnity and breach of contract against Archer. (Dkt.
14 no. 27.) All three parties assert separate claims against Travelers on the payment and
15 performance bonds. (*Id.*; dkt. nos. 48, 9.)

16 TEC subsequently moved for summary judgment against Postel on its
17 counterclaim for breach of contract. (Dkt. no. 85.) The Court denied TEC's motion, and
18 TEC now seeks clarification and reconsideration. (Dkt. nos. 217, 218.)

19 **III. LEGAL STANDARD**

20 **A. Summary Judgment**

21 The purpose of summary judgment is to avoid unnecessary trials when there is no
22 dispute as to the facts before the court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
23 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the pleadings,
24 the discovery and disclosure materials on file, and any affidavits "show there is no
25 genuine issue as to any material fact and that the movant is entitled to judgment as a
26 matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is "genuine"
27 if there is a sufficient evidentiary basis on which a reasonable fact-finder could find for
28 the nonmoving party and a dispute is "material" if it could affect the outcome of the suit

1 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).
 2 Where reasonable minds could differ on the material facts at issue, however, summary
 3 judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.
 4 1995). “The amount of evidence necessary to raise a genuine issue of material fact is
 5 enough ‘to require a jury or judge to resolve the parties’ differing versions of the truth at
 6 trial.” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l*
 7 *Bank v. Cities Service Co.*, 391 U.S. 253, 288–89 (1968)). In evaluating a summary
 8 judgment motion, a court views all facts and draws all inferences in the light most
 9 favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793
 10 F.2d 1100, 1103 (9th Cir. 1986).

11 The moving party bears the burden of showing that there are no genuine issues
 12 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In
 13 order to carry its burden of production, the moving party must either produce evidence
 14 negating an essential element of the nonmoving party’s claim or defense or show that
 15 the nonmoving party does not have enough evidence of an essential element to carry its
 16 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210
 17 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s requirements,
 18 the burden shifts to the party resisting the motion to “set forth specific facts showing that
 19 there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The nonmoving party “may
 20 not rely on denials in the pleadings but must produce specific evidence, through
 21 affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME*
 22 *Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show
 23 that there is some metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285
 24 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted). “The mere existence of a
 25 scintilla of evidence in support of the plaintiff’s position will be insufficient.” *Anderson*,
 26 477 U.S. at 252.

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1 **B. Clarification And Reconsideration**

2 Under Fed. R. Civ. P. 60(b), a court may relieve a party from a final judgment,
 3 order or proceeding only in the following circumstances: (1) mistake, inadvertence,
 4 surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void
 5 judgment; (5) a satisfied or discharged judgment; or (6) any other reason justifying relief
 6 from the judgment. *Backlund v. Barnhart*, 778 F.2d 1386, 1387 (9th Cir. 1985). “Relief
 7 under Rule 60(b)(6) must be requested within a reasonable time, and is available only
 8 under extraordinary circumstances.” *Twentieth Century-Fox Film Corp. v. Dunnahoo*,
 9 637 F.2d 1338, 1341 (9th Cir. 1981) (internal citations omitted). A motion for
 10 reconsideration must set forth the following: (1) some valid reason why the court should
 11 revisit its prior order; and (2) facts or law of a “strongly convincing nature” in support of
 12 reversing the prior decision. *Frasure v. United States*, 256 F. Supp. 2d 1180, 1183 (D.
 13 Nev. 2003). On the other hand, a motion for reconsideration is properly denied when the
 14 movant fails to establish any reason justifying relief. *Backlund* 778 F.2d at 1388 (holding
 15 that a district court properly denied a motion for reconsideration in which the plaintiff
 16 presented no arguments that were not already raised in his original motion).

17 **IV. TEC’S MOTION FOR CLARIFICATION/RECONSIDERATION (DKT. NO. 218)**

18 TEC’s motion seeks both clarification and reconsideration of the Court’s Order
 19 denying summary judgment (“Order”). (Dkt. no. 217.) In that Order, the Court ruled on
 20 the primary issue presented in TEC’s motion for summary judgment — whether
 21 Nevada’s Prompt Payment Act (“PPA”) applies to the TEC Subcontract dispute. The
 22 Court found that the Nevada PPA does not apply because it is preempted by federal law.
 23 (*Id.*) TEC suggests that the parties may misconstrue the Order to hold that TEC is barred
 24 from pursuing its state law remedies. Archer’s response clarifies that there is no such
 25 misinterpretation. Nevertheless, to the extent there is any confusion about the scope of
 26 the Court’s Order, the Court clarifies that the Order does not address the merits of TEC’s
 27 breach of contract claim. As for TEC’s request that the Court clarify that the Order is not
 28 intended to adjudicate any violation of federal law or TEC’s right to pursue the payment

1 bond under the Miller Act, there is no need for clarification since these issues were
2 neither presented in TEC's motion for summary judgment nor considered by the Court.
3 Again, Archer's response shows there is no confusion as to these issues. The Court thus
4 grants TEC's request for clarification in part as stated. The Court denies TEC's request
5 for reconsideration as TEC has not offered any convincing arguments to persuade the
6 Court that it made a mistake.

7 **V. TRAVELERS' MOTION (DKT. NO. 158)**

8 Travelers seeks a ruling that TEC is barred from recovering lost profits under the
9 payment bond. (Dkt. no. 158.) TEC did not file a response. The Court agrees with
10 Travelers that the Miller Act, 40 U.S.C. § 3131 et seq., bars a subcontractor such as
11 TEC from recovery of unrealized profits. Travelers' motion (dkt no. 158) is granted.

12 **VI. REMAINING MOTIONS**

13 The remaining motions raise issues that are so intertwined that the Court will
14 address them in groups. Several motions rely on facts that the Court finds to be in
15 dispute. The remainder of the motions generally relates to the Assignment and will be
16 addressed collectively.

17 **A. Factual Disputes**

18 Viewing the evidence in the light most favorable to the non-moving parties, the
19 Court finds a genuine issue exists as to the following material facts. These disputes
20 preclude summary judgment as discussed further below.

21 **1. Postel's Alleged Abandonment of the Project**

22 The parties have presented a genuine issue of material fact as to whether Postel
23 abandoned the Project. TEC argues that Postel abandoned the Project and Archer
24 acknowledged this fact. As support, TEC offers Archer's February 20, 2012, Notice to
25 Cure to Postel and TEC's February 22, 2012, letter to Postel, in which TEC stated it had
26 learned from Archer that Postel had abandoned the Project. (Dkt. nos. 86-9, 86-10.)
27 However, in a subsequent letter dated February 28, 2012, TEC claimed it was receiving
28 conflicting information as to whether Postel had abandoned the Project. (Dkt. no. 86-16.)

1 In letters dated February 27 and March 2, 2012, Archer disputed TEC's contention that
 2 Postel had abandoned the Project. (Dkt. nos. 96-10, 86-20.) In fact, Archer stated in the
 3 February 27, 2012, letter that Postel was then involved and committed to work with
 4 Archer to fulfill Postel's contractual obligations to Archer. (Dkt. no. 96-10.)

5 Two of TEC's motions are premised on the Court's finding that Postel abandoned
 6 the Project. (Dkt. nos. 151, 153.) These two motions are therefore denied.⁹

7 **2. TEC's Responsibilities under the TEC Subcontract**

8 The Court finds that there is a genuine factual dispute as to whether TEC
 9 breached the TEC Subcontract and whether TEC was justified in demobilizing from the
 10 Project and in refusing to remobilize until three invoices were paid. The parties offer
 11 conflicting evidence about TEC's progress, Postel's work, and alleged delays to the
 12 Project caused by either Postel and/or TEC. First, TEC contends that it completed work
 13 through level 12. (Dkt. no. 86 at 4.) Archer argues that Postel and TEC were behind
 14 schedule and that it notified Postel that Archer would be withholding payments to Postel
 15 until deficiencies that Archer identified — including Postel's failure to provide a recovery
 16 schedule — had been addressed. (Dkt. no. 96-8). In fact, in the February 20, 2012,
 17 Notice to Cure to Postel, Archer took the position that Postel had failed to comply with
 18 the parties' contract terms. (*Id.*) This Notice, however, does not address any contention
 19 about TEC's alleged failure to perform.

20 With regard to payments made to TEC, the parties dispute why TEC was not paid
 21 as it demanded (i.e., because of insufficient documentation and applications for
 22 payment), but they agree that Archer only paid TEC the \$54,645.30 referenced in
 23

24 ⁹In one of these motions, TEC raises the legal issue of Archer's right to assert its
 25 negligence claim. (Dkt. no. 153 at 9.) This argument defies logic. TEC contends that
 26 because Archer had no contractual privity with TEC, Archer cannot assert a claim for
 27 negligence where it only seeks economic loss. At the same time, TEC argues that
 28 Archer's rights acquired by assignment of the TEC Subcontract are limited by Postel's
 rights under the same agreement because Archer stands in the shoes of Postel.
 Applying this same logic, the assignment of the TEC Subcontract establishes Archer's
 contractual privity with TEC.

1 Archer's February 24, 2012, letter (dkt. no. 96-9), after TEC had notified both Archer and
2 Postel that more invoices were outstanding. (See Notice to Postel, dkt no. 86-8 (TEC
3 stated that Postel owed at least \$80,000.00); Letter to Archer, dkt. no. 96-13 (TEC
4 demanded payments on three invoices before it would remobilize).) In fact, in one of
5 Archer's letters, Archer acknowledged that there may be invoices for extra work but
6 contended that proper supporting documents had not been submitted and invited TEC to
7 provide the supporting documentation. (Dkt. no. 96-9.) Archer claims that TEC did not
8 submit the requested documentation to support additional payments (dkt. no. 96-1 ¶ 29)
9 while TEC asserts that no further documentation was needed because it had provided all
10 supporting documents to Postel (dkt. no. 182 at 6; dkt. no. 86 at 5-6.) TEC also disputes
11 that its work was defective and offers evidence that it submitted a proposed "Time &
12 Materials Agreement" to Archer to continue work on the Project. (Dkt. no. 86 at 9-13; dkt.
13 no. 182 at 9; dkt. no. 86-15.) Moreover, Archer's demand that TEC remobilize came with
14 a condition that TEC agree to "the terms of the new project recovery schedule via
15 change order and accept a back charge in the amount of \$72,356 for the direct delay"
16 caused by TEC. (Dkt. no. 96-14.) As discussed, TEC's contention is that it is owed more,
17 not that it owed Archer for any delays.

18 Given these genuine factual disputes, the Court cannot find that TEC breached
19 the TEC Subcontract when it stopped work and refused to return as Archer demanded.
20 The fact that Postel does not believe Archer breached the Postel Agreement does not
21 resolve these factual disputes. (See dkt. no. 162-1 at 4.) Accordingly, Archer's motion for
22 summary judgment on its first counterclaim for breach of contract against TEC (dkt. no.
23 163) is denied.

24 **3. Postel's Alleged Performance under the TEC Subcontract**

25 The gist of TEC's claims involves payments for work performed under the TEC
26 Subcontract and Postel and Archer's alleged failure to perform their contractual
27 obligations. (Dkt. no 48 at 4-5.) TEC claims it was not paid in part because Postel failed
28 to submit payment applications to Archer while Archer contends that certain payment

1 applications were inadequate and that invoices for extra work were not properly
2 supported. It is not clear from the records whether these issues were communicated to
3 TEC.

4 Archer's communications to Postel show that Archer had issues with Postel's
5 performance and its failure to follow the work schedule under the Postel Subcontract.
6 (See, e.g., dkt. nos. 96-7, 96-8, 86-9.) Postel seems to dispute both TEC's and Archer's
7 allegations by claiming that it was merely a pass-through subcontractor and that it could
8 not pay TEC if Archer failed to pay. There is a genuine dispute as to whether Postel
9 timely and properly billed Archer for TEC's work as required under the TEC Subcontract,
10 and whether Postel was deficient in paying TEC. (Dkt. no. 192 at 3-14.) Postel raises the
11 "pay-when-paid" provision in the TEC Subcontract, contending that it was never paid for
12 TEC's work and that Archer never approved or paid any change order requests
13 submitted by TEC. (Dkt. no. 154 at 6-11.) This argument misses the point. TEC claims
14 Postel did not submit timely payment, so the fact that Archer did not pay would not
15 necessarily absolve Postel of its responsibility under the TEC Subcontract. TEC further
16 claims that apart from payments under the Postel Subcontract, Postel received a benefit
17 for extra work that TEC performed at Postel's request and for which TEC was not
18 compensated. (Dkt. no. 192 at 31-32.)

19 The intertwined and disputed allegations relating to payments under the Postel
20 Subcontract and the TEC Subcontract alone create a genuine issue of fact. These
21 disputes preclude summary judgment in favor of Postel on TEC's claims for breach of
22 contract, breach of the implied covenant of good faith and fair dealing, and unjust
23 enrichment. Postel's motion for summary judgment against TEC (dkt. no. 154) is denied.

24 **B. Issues Involving the Assignment**

25 **1. Validity**

26 TEC advances two challenges to the validity of the Assignment: first, the
27 Assignment violates paragraph 8.8 of the Postel Subcontract because Archer and Postel
28 claim that Postel was not in default; and second, paragraph 24.5 of the TEC Subcontract

1 prevents Postel from assigning the TEC Subcontract. Archer counters that the
 2 Assignment did not occur under paragraph 8.8 of the Postel Subcontract and argues that
 3 paragraph 24.5 of the TEC Subcontract does not restrict assignment by Postel. The
 4 Court agrees with Archer.

5 A contract is unambiguous if it is not susceptible to more than one interpretation.
 6 See *Margrave v. Dermody Props.*, 878 P.2d 291, 293 (Nev. 1994). The Court finds that
 7 the pertinent provisions of the Assignment — paragraph 8.8 of the Postel Subcontract
 8 and paragraph 24.5 of the TEC Subcontract — are not susceptible to more than one
 9 meaning. In fact, the parties do not contend that these provisions are ambiguous.

10 “[W]here a document is clear and unambiguous on its face, the court must
 11 construe it from the language therein.” *S. Trust Mortg. Co. v. K&B Door Co., Inc.*, 763
 12 P.2d 353, 355 (Nev. 1988). Additionally, when construing a contract, a court should
 13 consider the contract as a whole and “should not interpret a contract so as to make
 14 meaningless its provisions.” *Phillips v. Mercer*, 579 P.2d 174, 176 (Nev. 1978). In terms
 15 of assignment, “a contractual right is assignable unless assignment materially changes
 16 the terms of the contract or the contract expressly precludes assignment.” *Easton Bus.*
 17 *Opportunities, Inc. v. Town Exec. Suites-E. Marketplace, LLC*, 230 P.3d 827, 830 (Nev.
 18 2010) (citing Restatement (Second) of Contracts § 317(2)(a)-(c) (1981)).¹⁰ Moreover,
 19 “anti-assignment clauses are narrowly construed.” *Id.* (citation and internal quotation
 20 marks omitted).

21 Applying these contract principles here, the TEC Subcontract does not limit
 22 assignment to Archer only upon termination for Postel’s default. Paragraph 8.8 requires
 23 Postel to contingently assign all of its “subcontracts and purchase orders relating to the
 24 Project.” (Dkt. no. 96-4 ¶ 8.8.) Paragraph 8.8 then states that such assignment “shall

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 26
 27 ¹⁰The TEC Subcontract provides that “the laws of the State where the Project is
 28 located” (Nevada) govern their contract dispute. (Dkt. no. 86-5, ¶ 24.1.) The Court thus
 looks to Nevada law. The decision in *Easton* is the latest case where the Nevada
 Supreme Court addresses the validity and effect of an assignment.

1 take effect only upon Subcontractor's [Postel's] termination for default." (*Id.*) TEC argues
2 that the phrase "only upon" Postel's termination shows the parties' intent to allow
3 assignment to Archer only when Postel has defaulted. Paragraph 8.8 contains no such
4 limitation. The use of the phrase "only upon" Postel's termination expresses when the
5 conditional assignment would take effect; it does not limit assignment to Archer only in
6 the event of Postel's default.

7 TEC argues that because paragraph 8.8 does not expressly authorize assignment
8 to Archer under any other circumstances, and because the Postel Subcontract was
9 incorporated into the TEC Subcontract, Archer and Postel promised that the TEC
10 Subcontract would not be assigned other than upon Postel's termination for default. To
11 support this argument, TEC offers a construction of paragraph 24.5 of the TEC
12 Subcontract that is contrary to its plain meaning. Paragraph 24.5 of the TEC Subcontract
13 states as follows:

14 This Subcontract shall not be subcontracted or assigned in whole or in part
15 by the subcontractor [TEC] except with the written consent of the Company
[Postel]. Any attempt to effectuate a subcontract or an assignment shall be
16 null and void *ab initio*.

17 (Dkt. no 88-5 ¶ 24.5.) TEC argues that the second sentence in paragraph 24.5 restricts
18 all assignments, whether from TEC or Postel. TEC's construction, however, ignores the
19 first sentence, which restricts only assignments by TEC. The second sentence must be
20 read in context of the entire paragraph. Viewed as a whole, the first sentence restricts
21 TEC from assigning the TEC Subcontract without Postel's written consent, while the
22 second sentence addresses the effect of an assignment by TEC without Postel's
23 consent (i.e., the assignment would be void). Moreover, under TEC's construction, TEC
24 may assign with Postel's consent, but Postel may not assign at all. Paragraph 24.5 does
25 not support this broad construction. "To be effective, an anti-assignment clause should
26 contain a specific prohibition on the power to make an assignment and specifically state
27 that any attempted assignments will be void or invalid." *Easton*, 230 P.3d at 830 (quoting
28 Richard A. Lord, *Williston on Contracts* § 74:22 (4th ed. 2003)) (alterations and

1 internal quotation marks omitted). The assignment clause in paragraph 24.5 contains no
 2 express prohibition on Postel's power to make an assignment. Because the TEC
 3 Subcontract does not expressly prohibit assignment by Postel, Postel may assign it to
 4 Archer. See *id.*

5 In sum, the Court finds that the Assignment is valid. TEC's motion requesting that
 6 the Court find the Assignment to be invalid (dkt. no. 152) is denied.

7 **2. Effect**

8 Archer raises the issue of the effect of the Assignment in three motions. In the
 9 motion against TEC, Archer argues that TEC's two contract-based claims are legally
 10 tenuous because Archer had no contractual relationship with TEC before March 1, 2012,
 11 the effective date of the Assignment. (Dkt. no. 161.) In a motion against Postel (dkt. no.
 12 159), Archer argues that Postel owes a duty to indemnify Archer for any conduct that
 13 occurred before the effective date of the Assignment. In another motion against Postel
 14 (dkt. no. 160), Archer seeks partial summary judgment on Postel's third and fourth
 15 claims for breach of contract relating to the Assignment. The Court agrees with Archer in
 16 part.

17 In arguing that the Assignment is valid, Archer acknowledges the general rule that
 18 an assignment is invalid if it "materially changes the terms of the contract." *Easton*, 230
 19 P.3d at 830. But Archer seeks to impose the terms of the Assignment to limit TEC's
 20 rights under the TEC Subcontract.¹¹ Archer ignores the effect of an assignment of a
 21 contractual right.

22 An assignment "is a separate agreement between the assignor and assignee
 23 which merely transfers the assignor's contract rights, leaving them in full force and effect
 24 as to the party charged." *Easton*, 230 P.3d at 831 (quoting *Citibank, N.A. v.*
 25 *Tele/Resources, Inc.*, 724 F.2d 266, 269) (2d Cir. 1983)). Archer in fact cites to this

27 ¹¹TEC does not contend that the Assignment results in any material changes in
 28 the terms of the TEC Subcontract.

1 same language in its brief. (Dkt. no. 190 at 11.) However, Archer then seeks to import
 2 the terms of the Assignment into the TEC Subcontract, which would change the terms of
 3 the TEC Subcontract. Archer cannot have it both ways.¹²

4 The Assignment unambiguously expresses the rights assigned: Postel “hereby
 5 assigns, transfers and sets over to Archer Western Contractors, LLC (“Assignee”) all
 6 rights, title and interest held by the Assignor [Postel] in and to the following described
 7 contract: [TEC Subcontract].” (Dkt. no. 96-11 at 2.) The Assignment thus puts Archer in
 8 the place and stead of Postel under the TEC Subcontract. See *Citibank*, 724 F.3d at 269
 9 (citing 3 *Williston on Contracts* § 432, at 182 (3d ed.)) (“Insofar as an assignment
 10 touches on the obligations of the other party to the underlying contract, the assignee
 11 simply moves into the shoes of the assignor.”)

12 Archer argues that the Assignment contains an additional paragraph delineating
 13 what Archer and Postel agree to be the scope of the Assignment. True enough. This
 14 paragraph, however, identifies the parties’ assumptions, not the assignment — Archer
 15 “assumes and agrees” to “perform all remaining and executory obligations of” Postel and
 16 to “indemnify and hold the Assignor [Postel] harmless from any claim or demand
 17 resulting from non-performance by the Assignee from the date of this Assignment
 18 forward.” (Dkt. no. 96-11 at 2.) This paragraph contains a reciprocal agreement from
 19 Postel to assume and agree to remain responsible for contractual obligations existing
 20 before the date of the Assignment and to indemnify and hold Archer harmless. (*Id.*)
 21 According to Archer, this paragraph limits its liability to TEC under the TEC Subcontract
 22 to conduct that occurred before the Assignment. The paragraph does limit liability, but
 23 only between Archer and Postel in that it allocates these two parties’ respective
 24 responsibilities and assumptions of liabilities. It does not limit or modify the obligations

25
 26 ¹²Archer is not alone. TEC claims it is undisputed that TEC did not have any
 27 privity of contract with Archer. (Dkt. no. 182 at 11.) Yet, TEC asserts two contract-based
 28 claims against Archer premised on the TEC Subcontract and opposes dismissal of these
 claims. (See dkt. nos. 48, 189.)

under the TEC Subcontract, and Archer cannot seek to import this paragraph to the TEC Subcontract.¹³

Because the Assignment puts Archer in the place and stead of Postel under the TEC Subcontract, TEC can assert its two contract-based claims against Archer. Archer’s motion for summary judgment on TEC’s first and second claims for relief (dkt. no. 161) is therefore denied. The Court agrees with Archer that the existence of a contractual relationship between the parties renders the unjust enrichment claim unavailable.¹⁴ See *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187 (Nev. 1997) (citing 66 Am. Jur. 2d *Restitution* § 6 (1973) (“An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement.”)). Archer’s motion for partial summary judgment on TEC’s third claim for unjust enrichment (dkt. no. 162) is granted.

In its motion against Postel, Archer seeks summary judgment on its third claim for contractual indemnity under the Assignment. (Dkt. no. 159.) TEC’s claims are premised on events that allegedly occurred before TEC demobilized from the Project, including the alleged failure to pay TEC for work performed under the TEC Subcontract. (Dkt. no. 48.) TEC demobilized from the Project on February 29, 2012 (*supra* note 7), before the effective date of the Assignment (March 1, 2012). As discussed above, the Assignment expressly delineated Archer and Postel’s respective rights and liabilities. Postel assumed liabilities for “all obligations, responsibilities and liabilities of Assignor [Postel] under the Contract existing prior to the date of this Agreement and agrees to indemnify and hold

¹³In fact, if the paragraph does modify liability under the TEC Subcontract, then the Assignment is not valid. See *Easton*, 230 P.3d at 830 (an assignment is invalid if it makes material changes to the underlying contract).

¹⁴Postel did not raise this argument in seeking summary judgment against TEC. Postel argues that TEC's unjust enrichment claim fails because Postel did not receive any money on behalf of TEC. (Dkt. no. 154 at 22.) In response, TEC claims that it provided extra work at Postel's request that benefited Postel and for which Postel did not bill Archer. (Dkt. no. 192 at 31-32.)

1 the Assignee [Archer] harmless from any claim or demand resulting or arising from such
 2 pre-existing liabilities." (Dkt. no. 96-11 at 2.) As alleged, TEC's claims existed before the
 3 Assignment and thus fall within Postel's responsibilities and liabilities under the TEC
 4 Subcontract. Postel assumed and agreed to indemnify Archer for these liabilities.
 5 Archer's motion (dkt. no. 159) with respect to Postel's indemnification obligations under
 6 the Assignment is granted.

7 Archer's motion (dkt. no. 159) with respect to Postel's indemnification duty under
 8 paragraph 9.3 of the Postel Subconstruct is also granted.¹⁵ Paragraph 9.3 of the Postel
 9 Subcontract requires Postel to indemnify Archer from claims "arising out of or resulting
 10 from Subcontractor's actual or alleged failure to perform under this Agreement in
 11 accordance with the terms of this Agreement and the Contract Documents." (Dkt. no. 96-
 12 4.) TEC's claims raise questions as to Postel's performance on the Project and fall within
 13 paragraph 9.3's ambit. Postel thus has a duty to indemnify Archer under paragraph 9.3
 14 of the Postel Subcontract. This finding also resolves a related motion — Archer's motion
 15 to strike or disregard the affidavit of Danny Lucas (dkt. no. 201) — which the Court
 16 denies as moot.

17 The Court's findings regarding Archer and Postel's allocation of liability under the
 18 Assignment also resolve Archer's motion for partial summary judgment on Postel's third
 19 and fourth claims in Archer's favor. (Dkt. no. 160.) It was Postel, not Archer, who
 20 assumed liabilities under the TEC Subcontract that existed before the date of the
 21 Assignment. (Dkt. no. 96-11 at 2.) The Assignment does not support Postel's third claim
 22 for contractual indemnity under the Assignment. Nor does it support Postel's fourth claim
 23 for breach of contract. The gist of Postel's argument is that in the Assignment, Archer
 24 represented that it paid TEC \$54,645.30 for money owed to TEC, such that TEC's claim

25
 26 ¹⁵Archer also references paragraph 9.1 of the Postel Subcontract, but that
 27 paragraph addresses liabilities resulting from "bodily injury, sickness, disease or death,
 28 or to injury to or destruction of tangible property." (Dkt. no. 96-4 ¶ 9.1.) Archer
 characterizes TEC's claims as relating to labor and equipment provided to Postel before
 March 1, 2012, not injury to person or property. (Dkt. no. 159 at 10.)

1 that it is owed more payments means that Archer breached the Assignment. But there is
2 no dispute that Archer paid TEC the amount identified in the Assignment. For these
3 reasons, Archer's motion for partial summary judgment (dkt. no. 160) is granted.

4 **VII. CONCLUSION**

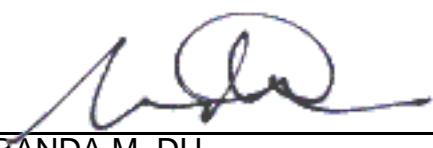
5 The Court notes that the parties made several arguments and cited to several
6 cases not discussed above. The Court has reviewed these arguments and cases and
7 determines that they do not warrant discussion as they do not affect the outcome of the
8 parties' motions.

9 It is therefore ordered that TEC's motion for clarification and/or reconsideration
10 (dkt. no. 218) is granted in part and denied in part as stated herein.

11 It is ordered that the following motions are granted: (1) TEC's motion for partial
12 summary judgment against Archer relating to their contractual relationship (dkt. no. 153);
13 (2) Archer's motion for partial summary judgment on its third crossclaim for
14 indemnification against Postel (dkt. no. 159); (3) Archer's motion for partial summary
15 judgment on Postel's third and fourth crossclaims (dkt. no. 160); (4) Archer's motion for
16 partial summary judgment on plaintiff's third claim for unjust enrichment (dkt. no. 162);
17 (5) Traveler's motion for summary judgment (dkt. no. 158).

18 It is further ordered that the following motions are denied: (1) TEC's motion for
19 summary judgment on its counterclaim relating to Postel's abandonment (dkt. no. 151);
20 (2) TEC's motion for summary judgment against Archer relating to invalidity of the
21 Assignment (dkt. no. 152); (3) Postel's motion for summary judgment against TEC (dkt.
22 no. 154); (4) Archer's motion for summary judgment on TEC's first and second claims
23 (dkt. no. 161); (5) Archer's motion for partial summary judgment on its first counterclaim
24 against TEC (dkt. no. 163); and (6) Archer's motion to strike or disregard the affidavit of
25 Danny Lucas (dkt. no. 201).

26 DATED THIS 4th day of March 2015.

27 
28 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE